

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 02-55795 JRG  
3DFX INTERACTIVE, INC., Chapter 11  
Debtor.

ORDER AWARDING CONTINGENT FEES AND EXPENSES  
BY SPECIAL LITIGATION COUNSEL FOR CHAPTER 11 TRUSTEE  
(COTCHETT, PITRE, SIMON & MCCARTHY)

**I. INTRODUCTION**

Cotchett, Pitre, Simon & McCarthy (Cotchett) is employed as special counsel to William A. Brandt, Jr., Chapter 11 trustee. Cotchett's employment was to pursue litigation against directors and officers of the debtor. Cotchett requests that the court confirm its contingent fees in the amount of \$1,411,972.12, and expenses in the amount of \$69,388.00. The court received one objection to Cotchett's application from Carlyle Fortran Trust (Carlyle). After reviewing the documents submitted by the parties and considering the arguments presented at the hearing on Cotchett's application, the court overrules Carlyle's objection. As herein stated, the court approves Cotchett's application for fees and expenses.

**II. BACKGROUND**

1 Cotchett was hired by the Chapter 11 Trustee to pursue litigation  
2 against former directors and officers of the debtor (D&O litigation).  
3 Cotchett's application for employment pursuant to §§ 327 and 328 of the  
4 Bankruptcy Code was approved by the court on August 28, 2003. The terms  
5 of Cotchett's employment provide for the payment of their fees and expenses  
6 on a contingency basis under a fee agreement with the Chapter 11 Trustee.  
7 The fee agreement also provides:

8 Associate counsel may be employed at the discretion and expense of  
9 the attorneys, (with such approvals as may be required by the  
10 Bankruptcy Court), but these associate counsel fees shall not be an  
11 additional expense to the CLIENT and shall be deducted from the fees  
12 paid to the law firm.

13 Eventually the D&O litigation settled and the Chapter 11 Trustee  
14 recovered \$5.5 million on behalf of the estate. Cotchett seeks approval of  
15 the payment of its contingency fees and expenses.

16 Carlyle objects on the basis that the Chapter 11 Trustee's counsel,  
17 Buchalter, Neimer, Fields & Younger (Buchalter), provided substantial  
18 assistance to Cotchett in prosecuting the estate claim against the  
19 directors and officers. As the Chapter 11 Trustee's counsel, Buchalter is  
20 handling the Trustee's litigation against Nvidia.

21 The Trustee had filed an adversary proceeding against Nvidia for  
22 claims involving fraudulent conveyance and successor liability in  
23 connection with a transaction in which Nvidia bought the assets of the  
24 Debtor. In addition, Carlyle had initiated litigation against Nvidia over  
25 the same transaction, which was removed to the bankruptcy court, with  
26 pending claims involving breach of contract and various tort theories. The  
27 Trustee's lawsuit has involved substantial discovery, which Carlyle is  
28 aware of considering Carlyle's litigation against Nvidia.

Carlyle asserts that approximately \$754,568.00 of Buchalter's fees  
are related to analysis, coordination and assistance provided to Cotchett.

1 Thus, according to Carlyle, Buchalter acted as Cotchett's "associate  
2 counsel" pursuant to the terms of the fee agreement discussed above.  
3 Carlyle requests that at least \$481,310.12 of the fees requested by  
4 Cotchett be used to pay the legal fees incurred by Buchalter in connection  
5 with Buchalter's services as Cotchett's co-counsel.

6 According to Buchalter's fee application, filed under seal, a total  
7 of \$33,420.50 was spent with respect to the D&O litigation. The  
8 application provides support for Buchalter's contention that it was  
9 involved for the most part with bankruptcy issues related to the D&O  
10 litigation that arose from time to time.

### 11 **III. DISCUSSION**

12 The parties are in agreement that the standard of review of a  
13 contingency fee is as follows:

14 Under section 328, where the bankruptcy court has previously approved  
15 the terms for compensation of a professional, when the professional  
16 ultimately applies for payment, the court cannot alter those terms  
17 unless it finds the original terms "to have been improvident in light  
of developments not capable of being anticipated at the time of the  
fixing of such terms and conditions."

18 In re Reimers, 972 F.2d 1127, 1128 (9<sup>th</sup> Cir. 1992) (citations omitted).

19 In reviewing Carlyle's objection, the court concludes that Carlyle  
20 has failed to demonstrate that Buchalter's and Cotchett's coordination of  
21 discovery was a development that was not capable of being anticipated at  
22 the time Cotchett's application was approved. At the time Cotchett was  
23 employed, all parties, including Carlyle, were aware of the substantial  
24 discovery that was ongoing in the litigation between the Trustee and Nvidia  
and between Carlyle and Nvidia.

25 The fact that Buchalter provided assistance to Cotchett in the  
26 coordination of discovery was not an unanticipated development. It would  
27 be expected that Buchalter would provide Cotchett with relevant documents  
28

1 and depositions obtained as part of the Nvidia litigation to avoid a  
2 duplication of effort and costs.

3 In addition, the court has reviewed the entries submitted by Carlyle  
4 as evidencing Buchalter's involvement in the case to the point of becoming  
5 "associate counsel." The court disagrees with Carlyle's assessment. Many  
6 of the entries reflect that Buchalter has been engaged in substantial  
7 discovery with respect to the litigation with Nvidia. The court agrees  
8 with Cotchett's statement in its reply that the entries "demonstrate that  
9 both firms performed substantial work prosecuting their own separate  
10 actions, though coordinating with each other given their common cli

11 For the reasons herein stated, the objection of Carlyle is overruled.

12 IT IS HEREBY ORDERED that Cotchett's application for \$1,411,972.12 in  
13 contingency fees and \$69,388.00 in expenses is approved.

14 DATED: \_\_\_\_\_

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17 JAMES R. GRUBE  
18 UNITED STATES BANKRUPTCY JUDGE  
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5 UNITED STATES BANKRUPTCY COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7 CERTIFICATE OF SERVICE - page 1

8 I, the undersigned, a regularly appointed and qualified Judicial Assistant in the office of the Bankruptcy  
9 Judges of the United States Bankruptcy Court for the Northern District of California, San Jose, California  
hereby certify:

10 That I am familiar with the method by which items to be dispatched in official mail from the Clerk's  
11 Office of the United States Bankruptcy Court in San Jose, California processed on a daily basis: all such items  
12 are placed in a designated bin in the Clerk's office in a sealed envelope bearing the address of the addressee,  
from which they are collected at least daily, franked, and deposited in the United States Mail, postage pre-paid,  
by the staff of the Clerk's Office of the Court;

13 That, in the performance of my duties, on the date set forth below, I served the **ORDER AWARDING**  
14 **CONTINGENT FEES AND EXPENSES BY SPECIAL LITIGATION COUNSEL FOR CHAPTER 11**  
**TRUSTEE (COTCHETT, PITRE, SIMON & MCCARTHY)** in the above case on each party listed below  
15 on the next page by depositing a copy of that document in a sealed envelope, addressed as set forth, in the  
designated collection bin for franking, and mailing.

16 I declare under penalty of perjury under the laws of the United States of America that the foregoing  
17 is true and correct.

18 Executed on \_\_\_\_\_ at San Jose, California.

19  
20 LISA OLSEN

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5 UNITED STATES BANKRUPTCY COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7 CERTIFICATE OF SERVICE - page 2  
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